

**Center for Regulatory Effectiveness’ (“CRE”) Comments on
Bureau of Ocean Energy Management’s (“BOEM”)
Revised Application for Gulf of Mexico (“GOM”)
Geological & Geophysical (“G&G”) Take Rules
 (“Revised Application”)
Under the Marine Mammal Protection Act (“MMPA”),
<https://www.gpo.gov/fdsys/pkg/FR-2016-12-08/pdf/2016-29388.pdf> , and
<https://www.gpo.gov/fdsys/pkg/FR-2016-12-20/pdf/2016-30492.pdf> .
Comments addressed to Jolie Harrison, Chief, Permits and
Conservation Division, Office of Protected Resources,
National Marine Fisheries Service (“NMFS”), and
Filed January 23, 2017, at
ITP.Laws@noaa.gov**

I. EXECUTIVE SUMMARY

The Revised Application violates the Information Quality Act Guidelines (“IQA”). These IQA violations include but are not limited to BOEM and NMFS’ admitted use of unvalidated, inaccurate and unreliable models to estimate Takes. This use of indisputably bad models results in inaccurate, unreliable and grossly exaggerated Take estimates.

The Revised Application also violates the requirements of the Office of Management and Budget’s (“OMB”) Peer Review Bulletin.

The Revised Application and BOEM/NMFS’ GOM Take Rules have to comply with Executive Orders 12866, 13563 and 13211, and have not yet done so. For example, BOEM and/or NMFS have to submit draft proposed GOM Take Rules to OMB’s Office of Information and Regulatory Affairs (“OIRA”) for review before publishing the proposed rules. The draft proposed rules sent to OMB/OIRA must contain BOEM/NMFS’ assessment of the cost and benefits of the proposed rules. BOEM and/or NMFS must allow stakeholder input on this assessment before it is sent to OMB/OIRA, and before it is published as a Notice of Proposed Rulemaking (“NPRM”).

BOEM and NMFS have not yet taken these required steps. Yet they intend to publish their NPRM for the GOM Take Rules by April 2017. This April 2017 publication date is infeasible given the Executive Orders’ regulatory review requirements, the change in Administrations, and the likelihood of intense and justified opposition to the proposed GOM Take Rules.

The Revised Application and BOEM/NMFS’ Take Rules for the GOM (as currently known) lack practical utility under the Paperwork Reduction Act (“PRA”). Consequently, OMB/OIRA should not approve the new Information Collection Requests

("ICRs") that are necessary for BOEM and NMFS' implementation and enforcement of the Rules.

The Revised Application could lead to GOM Take Rules that in effect ban oil and gas G&G in the GOM. This calamitous cost would be for rules that have little if any benefit.

BOEM should withdraw the Revised Application and publish a new draft Application that is consistent with CRE's comments set forth above and below. BOEM and NMFS should publish the new draft Application for public comment. **BOEM should consider returning to its original Application for GOM Take Rules, which uses Line Transect and not inaccurate models to estimate Takes.**

CRE requests that BOEM and NMFS respond to these CRE comments on the Revised Application if and when they propose any GOM Take Rules. CRE also requests that the agencies send their response to CRE's comments to OMB/OIRA for review along with any draft proposed GOM Take Rules, their proposed assessment of costs and benefits, and proposed ICRs for the Rules.

II. BOEM AND NMFS' PROPOSED USE OF INACCURATE AND UNRELIABLE MODELS IS ARBITRARY, CAPRICIOUS, AND VIOLATES THE IQA

The revised application depends on models for many purposes, including estimation of Takes.¹

BOEM and NMFS concede in the revised application that these models are not accurate and reliable:

"There are currently no available robust, quantitative models that fully translate exposures to takes at the broader programmatic and aggregate scale that is the subject of this petition. Notably, BOEM and NMFS are co-funding a research project to develop a model to quantify takes at these aggregate scales, but this model is not available in time for this petition."²

The IQA requires that BOEM and NMFS use accurate and reliable models.³

¹ *E.g.*, Revised Application, section 6, pages 93 *et seq.*, at http://www.nmfs.noaa.gov/pr/permits/incidental/oilgas/boem_2016rule_app.pdf.

² Revised Application, page 93, at http://www.nmfs.noaa.gov/pr/permits/incidental/oilgas/boem_2016rule_app.pdf. *Accord*, Revised Application, page 95.

³ NOAA/NMFS' IQA Guidelines are available at http://www.cio.noaa.gov/services_programs/info_quality.html. The Department of Interior and BOEM's IQA Guidelines are available at https://www.doi.gov/sites/doi.gov/files/migrated/ocio/information_management/upload/5

There are no accurate and reliable Take models, so BOEM and NMFS knowingly used inaccurate and unreliable models in the Revised Application.

Consequently, the Revised Application, which depends on bad models, violates the IQA.

BOEM/NMFS' use of these models also violates the Administrative Procedure Act ("APA") because that use is arbitrary and capricious.⁴

Before BOEM/NMFS can use any models to regulate, the agencies have to properly validate those models in order to demonstrate that they are accurate and reliable. CRE explained in previous, related comments that

"Validation requires demonstrating that the model predictions correlate well with reality. This demonstration requires comparing model predictions with field data--comparing the model output with real-world observations to see if the model is accurate and reliable."⁵

There is no administrative record demonstrating that these models are validated. That is because they aren't, and probably never can be.

BOEM/NMFS need to explain why they have abandoned use of the Line Transect to estimate Takes. BOEM's original application to NMFS for GOM Take Rules relied on Line Transect rather than inaccurate and unreliable models.⁶ Why the change? Line Transect is used globally.⁷ The Revised Application models are not because they are inaccurate and unreliable.

The superiority of Line Transect over inaccurate and unreliable models is discussed in a the CRE publication *The State of Seismic Regulation in the Gulf of Mexico*, which is

[15Guides.pdf](#) ; and at <https://www.doi.gov/ocio/policy-mgmt-support/information-and-records-management/iq> .

⁴ Section 706 of the APA is at <https://www.law.cornell.edu/uscode/text/5/706> .

⁵ CRE Acoustic Guidance ICR Comments, page 6 at http://www.thecre.com/creipd/wp-content/uploads/2016/11/mm_cre_comments_nmfs_acoustic_icr_filed.pdf ; CRE BOEM PEIS comments, pages 5-6, at http://www.thecre.com/creipd/wp-content/uploads/2016/11/cre_comments_boem_gom_peis_filed.pdf ; CRE's Arctic FEIS Comments, pages 6, at http://www.thecre.com/creipd/wp-content/uploads/2016/11/mm_cre_comments_NMFS_Arctic_FEIS_final.pdf . These three prior CRE comments are incorporated by reference in their entirety into these CRE comments on the Revised Application, as if fully set forth herein.

⁶ See, e.g., page 26 and Table 6.1 page 28, at http://www.nmfs.noaa.gov/pr/pdfs/permits/mms_gulfofmexico2004.pdf , for use of Line Transect.

⁷ See, e.g., CRE article at <http://www.thecre.com/forum13/?p=2728> .

incorporated in its entirety by reference into CRE's comments on the Revised Application as if fully set forth herein.⁸

III. THE GOM TAKE RULES MUST COMPLY WITH THE REQUIREMENTS OF EXECUTIVE ORDERS 12866, 13563 and 13211

The GOM Take Rules are "significant" under Executive Orders 12866, 13563 and 13211.⁹

Consequently, BOEM and/or NMFS have to comply with the requirements of these Executive Orders.¹⁰

A) Executive Orders 12866 and 13563

These two Executive Orders require that BOEM/NMFS submit draft proposed rules to OMB/OIRA for review before the rules are actually proposed.¹¹ Because the GOM Take Rules are "significant," before publication of proposed rules BOEM and/or NMFS must also at least "provide to the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) a general 'assessment of the potential costs and benefits of the regulatory action.'"¹²

We have not seen any public notice of this submission. EPA's latest Unified Agenda provides April 2017 as the time a NPRM will be published.¹³ We do not see how that date can be met given lack of any submission to OIRA, the opposition to the rule as currently known, and the change in Administrations.

⁸ This prior CRE document is available at http://www.thecre.com/forum13/wp-content/uploads/2013/03/State_of_Marine_Sound_Regulation1.pdf. Line Transect is discussed at pages 4, 7-8 and 11 of its Appendix.

⁹ Unified Agenda Listing for GOM Take Rules, at <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201610&RIN=0648-BB38>.

¹⁰ These Executive Orders are available at https://www.reginfo.gov/public/jsp/Utilities/EO_Redirect.jsp and at <https://www.epa.gov/laws-regulations/summary-executive-order-13211-actions-concerning-regulations-significantly-affect>.

¹¹ Executive Order 12866, Sections 2(e) and 6(a)(3), at https://www.reginfo.gov/public/jsp/Utilities/EO_Redirect.jsp

¹² Cost-Benefit and Other Analysis Requirements in the Rulemaking Process (CRS 2014), page 4 at <https://fas.org/sgp/crs/misc/R41974.pdf>.

¹³ <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201610&RIN=0648-BB38>.

Executive Order 13563 emphasizes that this required pre-publication submission must

“(to the extent permitted by law): (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs, (2) tailor regulations to impose the least burden on society, and (3) select regulatory approaches that maximize net benefits. It also directs agencies to ‘use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.’”¹⁴

Executive Order 13563 also requires that

“Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.”¹⁵

We do not know of any analyses prepared by BOEM/NMFS that comply with these Executive Order requirements for GOM Take Rules. We do not know of any effort by BOEM and/or NMFS to “seek the views” of stakeholders regarding these required analyses.

For “economically significant” rules, these Executive Orders require that BOEM and NMFS prepare a much more rigorous cost benefit analysis and send it to OMB/OIRA for review along with the draft proposed rules.¹⁶

As currently known, the GOM Take Rules will be economically significant because companies will be unable to comply with them if, as threatened, BOEM and NMFS try to apply NMFS’ new Acoustic Guidance on a case by case basis.¹⁷ Impossibility of

¹⁴ *Id.*, page 4, at <https://fas.org/sgp/crs/misc/R41974.pdf> .

¹⁵ Executive Order 13563, section 2(c), at <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review> .

¹⁶ Cost-Benefit and Other Analysis Requirements in the Rulemaking Process (CRS 2014), pages 4-5, at <https://fas.org/sgp/crs/misc/R41974.pdf> . “Economically significant” is defined as having “an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. *Id.*, pages 4-5, at <https://fas.org/sgp/crs/misc/R41974.pdf>.

¹⁷ See, e.g., CRE Acoustic Guidance ICR Comments, page 11 at <http://www.thecre.com/forum13/?p=2754>. These previous CRE comments are incorporated by reference into CRE’s Revised Application comments in their entirety as if fully set forth herein.

compliance could shut down GOM oil and gas exploration. This disastrous result would be “economically significant” as defined in the Executive Orders.¹⁸

The GOM Take Rules are also economically significant because environmental NGOs will incorrectly argue that BOEM/NMFS’ inaccurate models predict GOM Take estimates that preclude issuance of Take authorizations under the MMPA and other laws.

BOEM/NMFS will be unable to justify the costs of significant additional regulation of G&G in the GOM because there will be few if any benefits. The Revised Application acknowledges that there is no evidence long-standing G&G in the GOM has caused mortality, serious injury or stranding.¹⁹ NMFS agrees.²⁰

For decades, BOEM, NMFS, academics and NGOs have looked extensively for actual harm caused by G&G in the GOM. They have found none. This extensive and endless study is a waste of time, energy and resources given the absence of any observed harm. BOEM correctly stated with regard to GOM G&G:

“Within the [GOM] CPA, which is directly adjacent to the [GOM] EPA, there is a long-standing and well-developed OCS Program (more than 50 years); there are no data to suggest that activities from the preexisting OCS Program are significantly impacting marine mammal populations.”²¹

BOEM’s Science Officer recently emphasized: “To date, there has been no documented scientific evidence of noise from air guns used in geological and geophysical (G & G) seismic activities adversely affecting marine mammal populations or coastal communities.”²²

¹⁸ Cost-Benefit and Other Analysis Requirements in the Rulemaking Process (CRS 2014), pages 4-5 at <https://fas.org/sgp/crs/misc/R41974.pdf>.

¹⁹ E.g., Revised Application, pages 90-91, at http://www.nmfs.noaa.gov/pr/permits/incidental/oilgas/boem_2016rule_app.pdf.

²⁰ E.g., 79 FR 13626, 13635-36 (March 11, 2014), at <https://www.gpo.gov/fdsys/pkg/FR-2014-03-11/pdf/2014-05158.pdf>; 79 FR 12160, 12166 (March 4, 2014), at <https://www.gpo.gov/fdsys/pkg/FR-2014-03-04/pdf/2014-04770.pdf>; and 75 FR 49759, 49795 (Aug. 13, 2010), at <http://edocket.access.gpo.gov/2010/2010-19962.htm>.

²¹ Bureau of Ocean Energy Management’s Draft Environmental Impact Statement (“DEIS”), for the Gulf of Mexico, Outer Continental Shelf (“OCS”), Eastern Planning Area (“EPA”) Lease Sales 225 and 226, page 2-22. The DEIS is available online at <https://www.boem.gov/nepaprocess/>. *Accord*, Gulf of Mexico OCS Oil and Gas Lease Sales: 2012-2017; Western Planning Area Lease Sales 229, 233, 238, 246, and 248; Central Planning Area Lease Sales 227, 231, 235, 241, and 247; Final Environmental Impact Statement; Volume I, page 4-215; Volume II, page 4-710; available online at <https://www.boem.gov/nepaprocess/>.

²² <http://www.thecre.com/forum13/?p=1743>.

The revised Application suggests that Oil and Gas G&G seismic may have been a cause of a 2008 stranding of melon-headed whales in Madagascar. The Application further states that this is unlikely to happen in the GOM.²³

The Application is right on one point. This is unlikely to happen in the GOM because it did not happen in Madagascar.

The Revised Application's discussion of the melon-headed whale stranding is based on a Report "facilitated" by the International Whaling Commission. This IWC report was published several years after the strandings.²⁴ The Report exonerates nearby use of seismic airguns for oil and gas exploration as a possible cause of these strandings. The IWC Report's conclusion about seismic is clearly correct because no seismic airguns were used in the area before the strandings. Moreover, there is no evidence that seismic airguns can cause strandings.

However, the Report implicates nearby use of a multi-beam echosounder system (MBES) for oil and gas exploration as a possible contributing cause to the stranding.

The Report's MBES implications are incorrect for the following and other reasons:

1) The Report's time-line for the strandings has errors and is inconsistent with the best available evidence;

2) The best available evidence (*e.g.*, satellite images of stranded whales on May 20) indicates that the strandings began before MBES began on May 29;

3) The Report's conclusions are inconsistent with necropsy results, which show no sound-induced damage;

4) The Report's conclusions are inconsistent with the absence of any other strandings from MBES used in Madagascar or anywhere else;

5) There is no evidence supporting the Report's speculation as to why previous MBES use in the area did not cause strandings; and

²³ Revised Application, page 91, at

http://www.nmfs.noaa.gov/pr/permits/incidental/oilgas/boem_2016rule_app.pdf.

²⁴ "Final report of the Independent Scientific Review Panel investigating potential contributing factors to a 2008 mass stranding of melon-headed whales (*Peponocephala electra*) in Antsohihy, Madagascar," Southall et al. ("IWC Report"), available at <http://iwc.int/2008-mass-stranding-in-madagascar>. These facts are discussed in more detail in an online CRE publication, available at <http://thecre.com/newipd/wp-content/uploads/2013/10/Washington-Post-Madagascar-2-f-42.pdf>, which is incorporated by reference in its entirety in these CRE comments as if fully set forth herein.

6) Onshore surface currents that force downwelling conditions in the area have previously been associated with strandings in Madagascar, and are a much more plausible cause of these strandings.

B) Executive Order 13211

GOM Take Rules must also comply with Executive Order 13211, which

requires covered agencies (to the extent permitted by law) to prepare and submit to OMB a ‘Statement of Energy Effects’ for ‘significant energy actions.’ The statement, which is to be published in the proposed rule and the final rule, is to include a detailed statement of ‘any adverse effects on energy supply, distribution, or use’ for the action, and reasonable alternatives and their effects.”²⁵

We are unaware of any analysis prepared by BOEM and/or NMFS that complies with these Executive order 13211 requirements. When BOEM and NMFS do prepare and publish such a Statement of Energy Effects, it must consider the effects of shutting down oil and gas exploration in the Gulf of Mexico because that is the likely effect of the Rules as currently known. This 13211 assessment must be included the proposed rule package sent to OMB/OIRA for review before publication, and stakeholders should be involved in its preparation.

IV. THE REVISED APPLICATION AND PROPOSED GOM TAKE RULES VIOLATE OMB’S PEER REVIEW BULLETIN

For the following reasons, the Revised Application and GOM Take Rules are a Highly Influential Scientific Assessment (“HISA”) under OMB’s Peer Review Bulletin. They are also “Influential Scientific Information” under the Peer Review Bulletin. They have not complied with the OMB Bulletin’s requirements for either.

The Revised Application contains

“factual inputs, data, models, analyses, technical information, or scientific assessments related to such disciplines as the behavioral and social sciences, public health and medical sciences, life and earth sciences, engineering, or physical sciences.”²⁶

²⁵Cost-Benefit and Other Analysis Requirements in the Rulemaking Process (CRS 2014), page 9, at <https://fas.org/sgp/crs/misc/R41974.pdf>.

²⁶ OMB Peer Review Bulletin, pages 10-11, at http://www.cio.noaa.gov/services_programs/pdfs/OMB_Peer_Review_Bulletin_m05-03.pdf.

The Revised Application is also

“an evaluation of a body of scientific or technical knowledge, which typically synthesizes multiple factual inputs, data, models, assumptions, and/or applies best professional judgment to bridge uncertainties in the available information. These assessments include, but are not limited to, state-of-science reports; technology assessments; weight-of-evidence analyses; meta-analyses; health, safety, or ecological risk assessments; toxicological characterizations of substances; integrated assessment models; hazard determinations; or exposure assessments.”²⁷

The Revised Application and GOM Take Rules are HISA under OMB’s Peer Review Bulletin because they meet the economic impact criterion for HISA: *e.g.*, they could preclude oil and gas exploration in the GOM.²⁸ Regardless of economic impact, they qualify as HISA because they are “novel, controversial, or precedent-setting, or [have] significant interagency interest.”²⁹

At the very least, the Rules are “Influential Scientific Information” and therefore subject to the OMB Bulletin’s peer review requirements.³⁰

We are unaware of any peer review of the Revised Application’s Take estimates, or of any other part of the Revised Application.

Consequently, the Revised Application violates the OMB Peer Review Bulletin.

These violations (*e.g.*, the Application’s inaccurate Take estimates) will inevitably spill over and contaminate any Take Rules based on the Revised Application. Prior CRE comments discuss Peer Review Bulletin non-compliance in detail in the context of BOEM’s draft PEIS for GOM Take Rules. These prior CRE comments are incorporated by reference in their entirety as if fully set forth herein.³¹

²⁷ *Id.* page 11 at

http://www.cio.noaa.gov/services_programs/pdfs/OMB_Peer_Review_Bulletin_m05-03.pdf .

²⁸ The definitions of HISA are at pages 11 and 23 of OMB’s Peer Review Bulletin, at http://www.cio.noaa.gov/services_programs/pdfs/OMB_Peer_Review_Bulletin_m05-03.pdf.

²⁹ *Id.*

³⁰ See OMB Peer Review Bulletin, page 11 at

http://www.cio.noaa.gov/services_programs/pdfs/OMB_Peer_Review_Bulletin_m05-03.pdf.

³¹ These prior CRE comments are available at http://www.thecre.com/creipd/wp-content/uploads/2016/11/cre_comments_boem_gom_peis_filed.pdf . They are incorporated by reference in their entirety as if fully set forth herein.

V. OMB/OIRA SHOULD NOT APPROVE THE NEW ICRs THAT BOEM AND NMFS WILL NEED TO IMPLEMENT GOM TAKE RULES

In response to CRE's comments, OMB/OIRA approved BOEM's current ICR for GOM G&G on the following terms:

“Terms of Clearance: The public will be given the opportunity to comment on substantive modifications made to any information collections as a result of changes to NTL 2007-G02 and 30 CFR 250, subpart B regulations.”³²

This means that BOEM and NMFS will a new ICR for any GOM Take Rules, and they must provide opportunity for public comment and seek OMB/OIRA approval of that new ICR.

Without substantial revisions of the Revised Application and of the GOM Take Rules as currently known, OMB/OIRA should not grant new ICRs for the following and other reasons:

- Many IQA violations;
- Failure to comply with the OMB Peer Review Bulletin;
- Failure to comply with Executive Orders 12866, 13563 and 13211;
- Lack of Practical Utility under the PRA; and
- Extreme costs and burden, with little if any benefits.

These reasons are discussed in more detail in CRE's comments on NMFS' proposed ICR for the Acoustic Guidance, which are incorporated in their entirety into these CRE comments on the Revised Application as if full set forth herein.³³

VI. RECOMMENDED ACTIONS

BOEM/NMFS should withdraw the Revised Application and publish a new draft Application that is consistent with CRE's comments set forth above. This new

³² This ICR is discussed in detail in pages 6-8 of the CRE document at http://www.thecre.com/forum13/wp-content/uploads/2013/03/State_of_Marine_Sound_Regulation1.pdf, which is incorporated by reference in its entirety as if fully set forth herein.

³³ These prior CRE comments on NMFS' proposed ICR for the Acoustic Guidance are available at http://www.thecre.com/creipd/wp-content/uploads/2016/11/mm_cre_comments_nmfs_acoustic_icr_filed.pdf. They are incorporated by reference in their entirety as if fully set forth herein.

Application should be published as a draft for public comment. BOEM should consider returning to its original Application for GOM Take Rules and the use of Line Transect to estimate Takes.³⁴

CRE requests that BOEM and NMFS respond to these CRE comments on the Revised Application if and when they propose any GOM Take Rules. CRE also requests that the agencies send their response to CRE's comments to OMB/OIRA for review along with draft proposed GOM Take Rules, their proposed assessment of costs and benefits, and their requested ICRs for the Rules.

Respectfully Submitted,

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³⁴ BOEM's original Application is available at http://www.nmfs.noaa.gov/pr/pdfs/permits/mms_gulfofmexico2004.pdf.